of two-thirds of each house remove such disability."

This rule reflects two longstanding tenets of common-law criminal jurispriudence: that the"truth of every accusation" against a defendant "should after wards be confirmed by the unanimous sufferage of tweleve of his equals and neighbours", 4W. Blackstone, Commentaries on the laws of England 343 (1769), and that "an accusation which lack's any particular fact which the law makes essential to the punishment is *** accusation within the requirement of common law, and it is no accusation in reason". In other words, *** every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. 1J. Biship, Criminal Procedure, ch. 6pp. 50-56 (2d Ed. 1872) **SEE: BLAKELY v. WASHINGTON,** 542 U.S.___ (2004).

The Commission is a creation of the SRA, which authorizes the Guidelines. Accordingly, the Guidelines carry the force of law and are "binding on Federal Courts". **SEE: STINSON v.UNITED STATES,** 508 U.S. 36, 42 (1993).

As uniformly interpreted by the courts of Appeals, section 3553(b) of Title 18 of the U.S. Code prohibits sentences exceeding the top of the applicable Guidelines range unless the Court makes finding of fact that justify an upward departure. **SEE: E.G. UNITED STATES v.DAVERN,** 937 F.2d 1041 (CA 6 1991)(En banc): compare id. at 1042 (Merritt, J., dissenting).

Even though the Commission is located in the judicial branch, the U.S. Supreme Court has treated the Guidelines as "the equivalent of legislative rules adopted by Federal agencies". **SEE: STINSON,** 508 U.S. at 45 Guidelines promulgated pursuant to Congresional del-

gation under the SRA are subject to the Sixth Amendment in the same fashion as any statute or other legislative rule.

The Supreme Court applied the clause to a similar State sentencing scheme in **MILLER v. FLORIDA,** relying on the fact that the guidelines, far from being "flexible 'guidepost' for use in the exercise of decretion", significantly constrained Judicial decretion by requiring Judges to make particular findins to justify departures from the guidelines sentencing range. 482 U.S. 423, 435 (1987).

Petitioner, submits that the **SUPREME COURT** settled this very issue around or about (12) years ago. It was argued December 10th, 1991. Decided March 24th, (1992) **UNITED STATES v. R.L.C.,** 503 U.S. 291, 117 L.Ed 2d 559, 112 S.Ct. 1329 [NO. 90-1577] (1992).

In this case the Supreme Court rejected the government's attempt to argue that on "authorized" sentence only refers to the penalty provisions in the "charging statute", rather than the limitations imposed through the Sentencing Guidlines. The same defense is anticipated to be raised in this case at bar by the government, and is therefore being addressed herein.

The Supreme Court in **R.L.C.,** held that the penalty provisions in the charging statute setting forth the maximum possible penalty **are not** to be given primacy over the maximum possible penalty permissible under the Sentencing Guidelines. Id. **R.L.C.,**117 L.Ed 2d 559 (1992). **SEE ALSO: APPRENDI v. NEW JERSEY,** 120 S.Ct. 2391 (O' Conner, J. with Rehnquisht, C.J. Kenndy and Bryer, J.J. join dissenting).

Under the stare decisis ("to stand by things decided") established in **R.L.C.,** supra, this Court lacked jurisdiction to impose a 19 year, 6 months sentence on Count One charged with the Petitioner, as

it exceeds the statutory maximum as established by the Jury's finding in Petitioner's trial for an offense of conviction set by the Sentencing Guidelines.

The District Court in **R.L.C.**, found the **R.L.C.**, a juvenile, committed an act of juvenile delinquency withing the meaning of 18 U.S.C. 5031, because his acts would have been the crime of involuntary manslaughter in violation of 18 U.S.C. 1112 (a) and 1153 if committed by an adult.

The maximum sentence for involuntary manslaughter under 1112(b) was three years. At **R.L.C.'s** dispositional hearing the District Court granted the government's request to impose the maximum penalty for Respondent's delingquency and accordingly committed him to official detention for three years.

Despite the manslaughter statute's provision for an adult sentence of that length, **the Eight Circuit vacated R.L.C. sentence and remanded for resentencing**, after concluding that (36) months exceeded the **CAP** imposed by 18 U.S.C. 5037 (c)(1)(b) upon the period of detention to which a juvenile may be sentenced. Id. **UNITED STATES v. R.L.C.,** 915 F.2d 320 (1990).

The government filed a petition for Certiorari to the Supreme Court, arguing that the maximum penalty authorized under statue refers to the charging statute; not the maximum statute under the Guidelines.

However, the United States Supreme Court rejected that argument as follows:

"The government suggests a straight forward inquiry into the plain meaning to explain what is **"AUTHORIZED"**. It argues that the

word "AUTHORIZED" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "AUTHORIZE" a term of imprisonment in punishment for a crime.

As against the position that the Sentencing Guidelines now circumscribe a trial Court's authority, the government insists that our concern must be with the affirmative authority for imposing a sentence, which necessarily stem from statutory law. It maintains that in any event the Sentencing Commission's Congressional authorization to establish sentencing guidelines does not create affirmative authority to set punishments for crime, and that the Guidelines do not purport to authorize the punishments to which they relate.

But this is to easy. The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory. SEE: 18 U.S.C. 3553(b)

More significantly, the government's argument that "Authorized" refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under Statutory mandate, seem to us to beg the question.

Of course it is true that no penalty would be "Authorized" without a statute providing specifically for the penal consequences of defined criminal activity.

The question however, is whether Congress intended Courts to treat the upper limit of such a penalty as "Authorized" even where proper application of a statutorily mandated guideline in an adult case would bar imposition up to that limit, and an unwarranted upward departure [503 U.S. 298] from the proper Guideline range would

be reversable error. **SEE**: 3742.

Here it suffices to say that the government construction is by no means plain. The text is as least equally consistent with treating **"AUTHORIZED"** to refer to the result of applying all statutes with a required bearing on sentencing decision, including not only those that empower the Court to sentence but those that limit the ligitamacy of its exercise of that power. This, is indeed, is arguably the more natural construction". Id. **R.L.C.**, 503 U.S. 291, 117 L.Ed. 2d 559; **MISTRETTA v. UNITED STATES,** 488 U.S. 361, 102 L.Ed. 2d. 714 (1989).

In the instant case at bar, Petitioner statutory mandated guidelines were 121-151 months, thus, sentenced **84 months above** Petitioner **statutory mandated guideline range**, over 114 months over Petitioner's minimum range, in violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment.

In **R.L.C.**, Supra, Respondent received on remand to the District Court 18 months.

Plain-meaning analysis **does not** then, **provide** the **Government** with a **favorable answer**. The most that can be said from examining the text in its present form is that the **Government** may claim its **preferred construction** to **be** one possible resolution of **statutory ambiguity**.

In quintessence, would it not be somewhat ingenuous to beleive that 18 U.S.C. 3553(b) and the mandatory minimun sentences are not serving two different punishments for the same offense.

Congress mandated the mandatory maximum/minimum sentences.;

Congress also mandated the Guidelines promulgated pursuant to Contressional delegation under the SRA which are also subject to the Sixth Amendment in the same fashion as any statute or other legislative rule.

Thus, while the mandatory maximum/minimum sentences and 3553 (b) sentences include telltale as being ambiguous. This ambiguity was or would have resolved by an amendment that, **absent promulgation of the Guidelines**, might have left the question of the **"AUTHORIZED"** maximum term of imprisonment to be determined only by reference to the penalty provided by statute creating the offense. **SEE: UNITED STATES v R.L.C.**, 503 U.S. 291, 117 L.Ed. 2d 559

[503 U.S. 304]

The Legislative history **does not** prove, however, that Congress intended **"AUTHORIZED" to refer solely to the statute defining the the offense** "dispite" **the enactment of a statute requiring application of the Sentencing Guidelines, a provision that will generally provide a ceiling more favorable to the defendent than that contained in the offense-defining statute.**

This is an expression of purpose that today can be achieved only by reading **"AUTHORIZED"** to refer the maximum period of imprisonment that may be imposed consistently with 18 U.S.C. 3553(b) [18 U.S.C.S. 3553(b)].

That statute provides that "[t]he Court **shall** impose a sentence *** within the range" established for the category of offense as set forth in the Guidelines, "unless the Court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a

sentence different from that described." **SEE:** 3553(b).

A statute is a statute, regardless, whatever its label. The United States Supreme Court do not think any ambiguity servives. If any did, however, the Supreme Court would choose the Construction yielding the shorter sentence by resting on the venerable rule of lenity; **SEE: UNITED STATES v. BASS**, 404 U.S. 336, 337-338, 30 L.Ed. 2d 488 (1971), rooted in "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," Id., at 348, 30 L.Ed. 2d 488 (quoting **H. FRIENDLY,** Benchmarks 209 (1967).

While the rule has been applied not only to resolve issues about the substantive scope of Criminal statutes, but to answer questions about the severity of sentencing, **SEE: BIFULCO v. UNITED STATES**, 447 U.S. 381, 65 L.Ed. 2d 205 (1980), its application is necessary in this case, "the Supreme Court have always reserved lenity for these situations in which a reasonable doubt persists about a statute's intended scope even after resort to **'the language and structure, legislative history, and motivating policies's of the statute'".**

The rule of lenity states that **a Court cannot interpret a Federal Statute** "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended". **SEE: LANDER v. UNITED STATES**, 385 U.S. 169, 178, 3 L.Ed. 2d 199 (1958).

The principle of construction applies to sentencing provisions as well as to substantive criminal statutes. **SEE: BIFULCO v. UNITED STATES**, 477 U.S. 381, 387, 65 L.Ed. 2d 205 (1980).

Therefore, the rule of lenity favors the statutory construction that yields the shorter sentence and it was error for the Court to sentence Petitioner under harsher penalty provisions of a schedule II controlled substance where the element of quanity was more then was listed in the indictment, nor charged by the Grand-Jury.

CONCLUSION

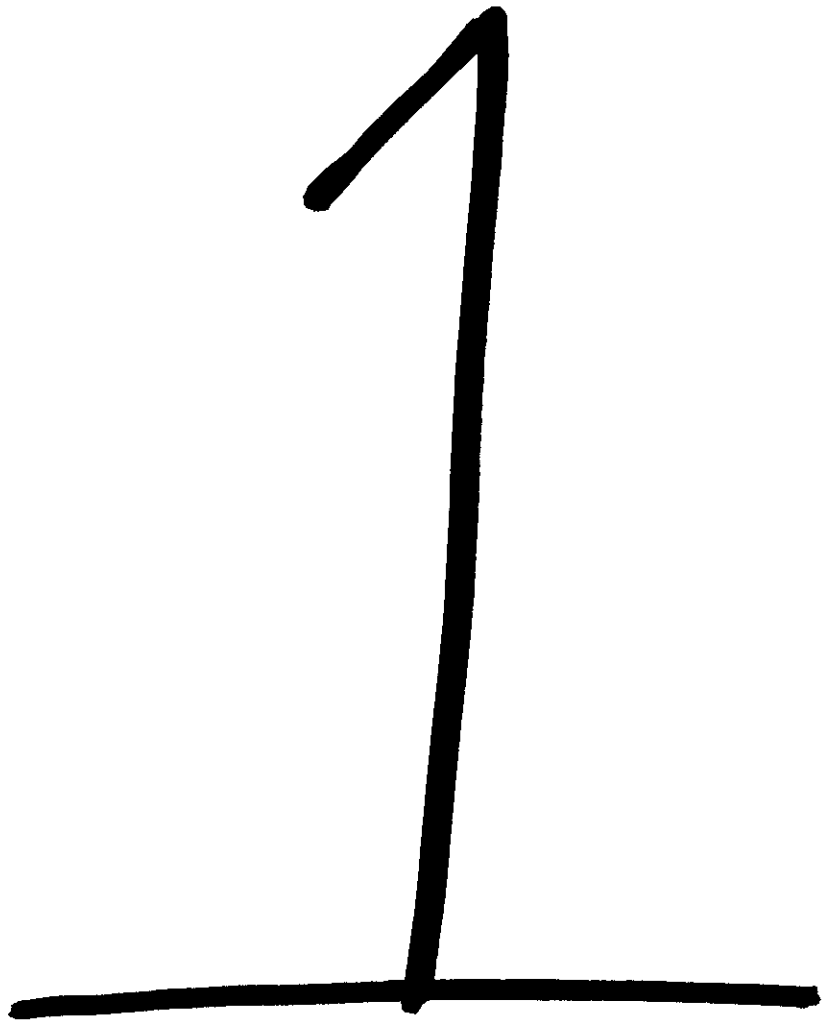
For the reasons and documented facts listed above, and in the interest of Justice and fundamental fairness, this Petitioner should be granted his relief. This Honorable Court should temper Justice with mercy before rendering a both fair and honest opinion on the above matter.

Respectfully Submitted

Dated: 10/26/04

Darryl Ford

Darryl Ford
#08943-040
F.M.C. Devens
P.O. Box 879
Ayer, MA. 01432



U.S. Department of Justice

Federal Bureau of Prisons

Washington, D.C. 20534

June 10, 2004

MEMORANDUM FOR DAVID WINN, WARDEN
FEDERAL MEDICAL CENTER, DEVENS, MASSACHUSETTS

FROM: Kathleen M. Kenney
Assistant Director/General Counsel

SUBJECT: FORD, Darryl
Federal Register Number 08943-040
Request for Reduction in Sentence (RIS)

Please be advised that Darryl Ford's request for a reduction in sentence (RIS) pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) is denied. We have consulted with the Medical Director, Health Services Division, and have carefully reviewed all of the documentation submitted with this request, including additional documentation regarding potential kidney transplantation.

Mr. Ford, age 33, was diagnosed with renal failure secondary to Glomerulonephritis, an inherited disorder. He has been on hemodialysis since 1991, and all vascular access has been exhausted. He currently receives peritoneal dialysis, a procedure that increases the risk of infection, and has been treated for peritonitis, a potentially life threatening intra-abdominal infection. While his life expectancy is uncertain, Mr. Ford will die without a kidney transplant.

While Mr. Ford's medical condition may meet the medical criteria for a RIS, a RIS is not assured simply because he has been diagnosed with a life-threatening or terminal medical condition, or is severely and permanently mentally or physically debilitated. In addition to evaluating an inmate's medical condition, the totality of the circumstances and public safety concerns must be addressed.

Mr. Ford was sentenced on April 19, 1998, by the Honorable Robert Holmes Bell, United States District Court Judge for the Western District of Michigan. He was convicted of violating 21 U.S.C. § 846 and § 841(a)(1), Conspiracy to Possess with the Intent to Distribute, and Distribution of Cocaine and Cocaine Base. He was held responsible for the distribution of 62 kilograms of cocaine base and was sentenced to a 235-month term of imprisonment followed by a five-year term of supervised release. His projected release date is September 3, 2015, via Good Conduct Time.

After careful review of the totality of the circumstances, it is inappropriate to release Mr. Ford at this time. At the time the Presentence Investigation Report (PSR) was prepared, the sentencing court was aware that Mr. Ford was in chronic renal failure and would eventually need a kidney transplant. In addition, on May 3, 2004, a transplant team at the University of Massachusetts Transplant Center evaluated Mr. Ford, and is continuing to follow their established process of evaluation to place him on the cadaver kidney transplant list. He will continue to receive medical care that is consistent with community standards. He may request reconsideration of his RIS request if the transplant center advises that he is not a viable transplant candidate and his condition further deteriorates. The denial of this request constitutes a final administrative decision. Please provide Mr. Ford with a copy of this decision.

cc: D. Scott Dodrill, Regional Director, NERO

U.S. Department of Justice

Federal Bureau of Prisons

Federal Medical Center, Devens

P.O. Box 880
Ayer, MA 01432

September 16, 2003

Exhibit (2)

Barbara Colby Tanase
Western District of M
P. O. Box 208
Grand Rapids, MI 495

Re: FORD, Darryl
Reg. No. 0894
Docket No. 1:9

Dear Ms. Tanase:

The above referenced inmate has submitted a request for compassionate release. A preliminary review of the request indicates Mr. Ford meets the eligibility requirements. Prior to submitting the request through the appropriate channels, we are required to solicit the opinion of the prosecuting Assistant United States Attorney.

Mr Ford is currently serving a 235 month (PLRA) sentence for Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine Base. He has a projected release date of September 3, 2015, via Good Conduct Time Release. Mr. Ford was sentenced by the Honorable Robert Holmes Bell in the Western District of Michigan on April 29, 1998. The details of his current medical condition are as follows.

Mr. Ford is a 32-year old African American male, who has end stage renal disease secondary to glomerulonephritis, which was diagnosed at the age of 16. For the past ten years, he has been on hemodialysis and most recently has ran out of vascular access points for continued hemodialysis. In order to establish vascular access for hemodialysis, he has had multiple surgeries including three arteriovenous (AV) fistulas in his left arm, one in the right arm, three in the right leg, and one in the left leg, all of which have been unsuccessful. He has no other dialysis access, therefore, peritoneal dialysis was initiated to treat his renal failure. However, this carries the risk of having a potentially serious life threatening intra-abdominal infection called peritonitis. Unfortunately, Mr. Ford has had this complication four times but thus far has managed to recover from the infection.

The University of Massachusetts Medical Center Urology Department has deemed him to be a good candidate for a kidney transplant. He has had several siblings tested for tissue compatibility as donors, however, none of them proved to be a kidney match. Mr. Ford's condition is urgent and could be terminal. His condition will worsen and cause death by mid life, unless he's able to secure a kidney transplant. He wishes to pursue this search upon release. If released to the community his level of care and anticipated medical needs would be significant, requiring dialysis and regular nephrology evaluations. He will have a better chance at achieving a cadaver kidney in the community, in order to save his life.

Concerning his health at the time of sentencing, the PSI reported that he was diagnosed with chronic renal failure in 1991 and had been receiving hemodialysis for the past seven years. He also had a serious problem with vascular access which made his dialysis inefficient. As a result, catheters were placed and he was advised that he needed a kidney transplant.

If released, Mr. Ford plans on living with his mother Jessie Ford in Kalamazoo, Michigan. Prior to his incarceration, he was under the care of two physicians in Michigan who knew his case well. He plans to make efforts to reconnect with them as he pursues arrangements for a kidney transplant. He will also be receiving Social Security Disability, Medicare and Medicaid, to help cover his medical and personal needs. We have forwarded correspondence to the United States Probation Office in the Western District of Michigan for review.

Please forward any comments or concerns held by your office regarding this proposal to Mr. Ford's assigned Unit Manager, John D. Colautti, at (978) 796-1367. Due to the deteriorating medical condition of Mr. Ford, we are expediting the request at all levels. Thank you for your time and cooperation in this matter.

Sincerely,

David L. Winn
Warden

JUROR SEAT 7: Yes.

COURTROOM DEPUTY: Mr. Obetts, were those your verdicts?

JUROR SEAT 8: Yes.

COURTROOM DEPUTY: Mr. Bates, were those your verdicts?

JUROR SEAT 9: Yes.

COURTROOM DEPUTY: Mr. Eggerding, were those your verdicts?

JUROR SEAT 10: Yes.

COURTROOM DEPUTY: Mr. Bursley, were those your verdicts?

JUROR SEAT 11: Yes.

COURTROOM DEPUTY: Ms. Eye, were those your verdicts?

JUROR SEAT 12: Yes.

THE COURT: Okay. Thank you. You may be excused to the jury room just briefly, and we have some paperwork that our clerks have to do in connection with your being here and we'll be with you in just a minute. If you could just retire shortly, please.

(Jury excused and left courtroom at about 1:40 P.M.)

THE COURT: Anything for the court or to be brought to the court's attention at this time?

It's my understanding that this is a conviction on

an 841(a)(1) offense, and under the statute the court is required to remand the defendants pending sentencing.

Sentencing will be set for May 1 in the morning. I don't want to have everybody waiting around, so let me say it's between 8:30 and 10:00 in the morning, and we'll do some scheduling among those times for individual defendants, so if counsel could just clear their schedules for early morning on May 1, and we will get back with you as to a specific time.

Anything else anyone wishes to --

MS. TANASE: Your Honor, with respect to the Defendant Darryl Ford, I've spoken with the Marshals Service, and in light of his medical condition it may be problematic to continue with his dialysis while he is awaiting designation to the Bureau of Prisons. Apparently they would have to have him seen by a new doctor before they could have him start undergoing treatment. The government does not oppose if the court's inclined to do that, allowing Mr. Ford to remain out on bond perhaps in a tether situation until such time as he's sentenced given his serious medical condition.

THE COURT: Mr. Garrett?

MR. GARRETT: We'd seek the court's indulgence on that matter.

THE COURT: You understand that in doing so, I've got a statute I'm flying in the face of.

MS. TANASE: I understand, Your Honor.

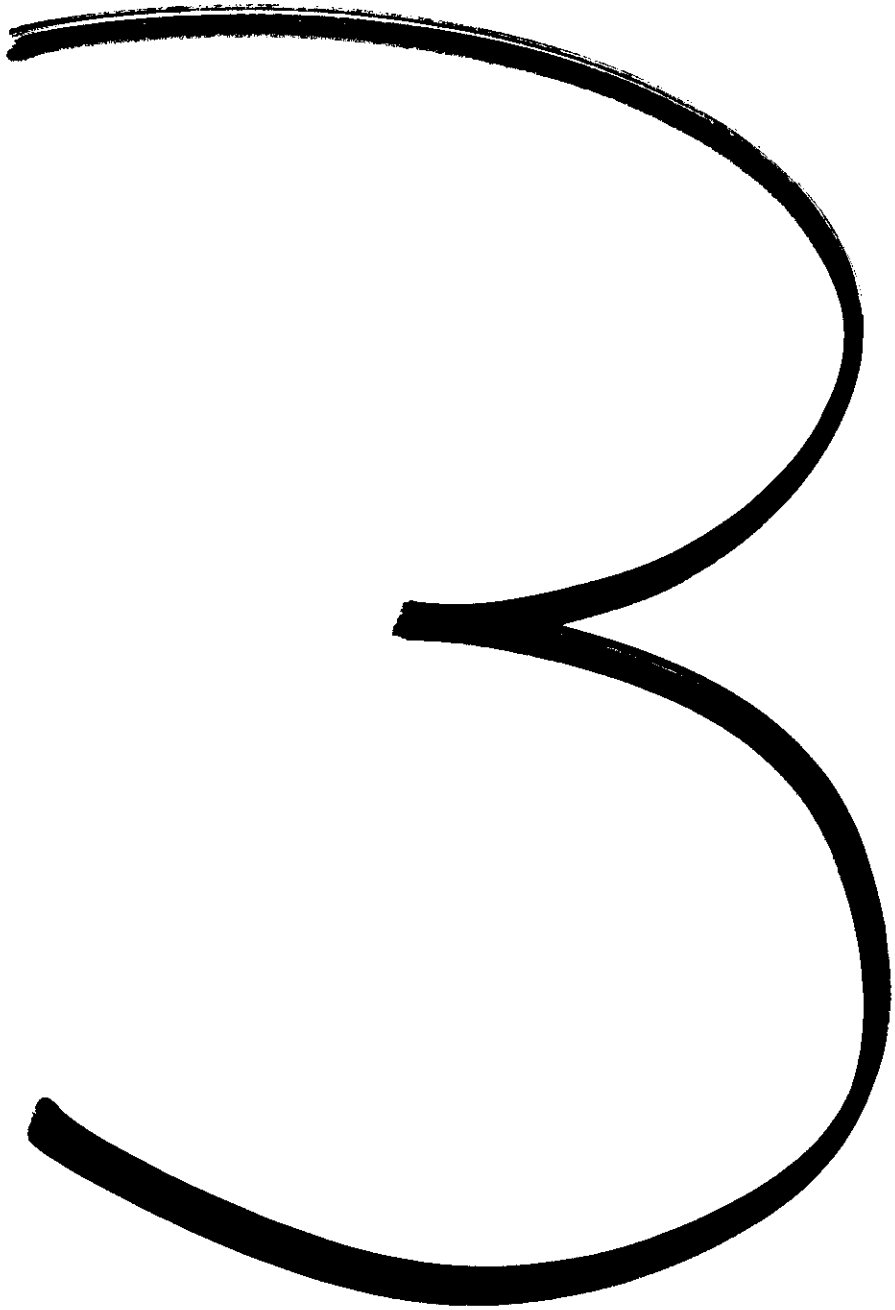
THE COURT: Due to the serious medical condition of Mr. Ford as illustrated by a letter from his doctor and the extreme expense that is involved and the necessity of his securing medical care that he's presently under, the court will require a 24-hour house tether at the present address where he resides to be worked out with Pretrial Services with medical release for purposes of securing the required dialysis, and I'm going to require weekly pretrial service checkups on this matter, and we will then continue him as though he were incarcerated but he's in his home and he has a medical release.

Anything else from anyone else?

Okay. Thank you. Thank you, for the lawyers who have given of your service to this court in this matter, and we'll look forward to seeing you later.

That's all.

(Proceedings concluded at 1:42 P.M.)



and then the charges set forth, conspiracy to possess with intent to distribute and distribute cocaine and cocaine base, and each one of these defendants' names listed, and beside the name are two boxes, that of not guilty and that of guilty. You will check one box for each one of these defendants, and then at the conclusion your foreperson will sign it and date it. Again, this is just a form, and it's intended to assist you once you have reached your conclusion in this matter.

Now, if you decide that the government has proven a defendant guilty, then it becomes my task to determine what the appropriate punishment should be. Deciding what the punishment should be is my task and not yours. It would violate your oath as jurors to consider possible punishments in deciding upon your verdict in this matter.

Let me conclude by repeating something I said earlier, and that is nothing that I have said during the trial nor in these instructions was intended to influence your decision in any way in this case.

Now, in this case we have 14 of you who have been here with us. Unfortunately, only 12 are required to deliberate and only 12 can deliberate, and the reason for having 14 is that many times family emergencies arise, people become ill, or something else occurs, and we have to excuse a juror, and by having extra jurors we can keep right on with the trial and don't have to stop it.